Supreme Court, U.S.
FILED
AUG 23 2000
CLERK

(5)

No. 99-1870

IN THE
SUPREME COURT OF THE UNITED STATES

EMILY ADLER, et al.,

Petitioners,

vs.

DUVAL COUNTY SCHOOL BOARD, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

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ARGUMENT

Despite the argument advanced by the respondents,[1] *Santa Fe Indep. Sch. Dist. v. Doe*, ___ U.S. ___, 120 S.Ct. 2266 (2000), decided after the petition was filed in this case, resolves every material issue of law contrary to the decision of the Court of Appeals. The decision in *Santa Fe* compels the conclusions that respondents' "Graduation Prayers" policy fails to divorce resulting prayers and other religious messages from state action, fails to protect minority views because of its use of majoritarian student elections of the speakers, fails to be otherwise religiously neutral and results in actual and apparent state endorsement of religion, particularly in the context of the coercive nature of attendance at public high school graduation ceremonies.

Santa Fe directly contravenes the Court of Appeals' refusal to consider the record facts, including the enactment of the "Graduation Prayers" policy in the context of an undisputed history of state encouragement and promulgation of prayers and other religious messages at graduations, as well as any fair reading of the face of the policy, and consideration of the record of events since its enactment. *See* App. 196a, *see also*, App. 182A n.9; *Adler v. Duval County Sch. Bd.*, 851 F.Supp. 446, 459 n.9 (M.D. Fla. 1994) *(Adler I)* ("Invocations and benedictions have been traditional and are therefore familiar if not expected at high school graduation ceremonies."). This

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[1] A brief in opposition also has been filed by putative parties characterizing themselves as "respondents-intervenors." It appears that those individuals are not proper parties before this Court. Their motion to intervene was denied as moot by the district court. Their appeal of the order denying their motion to intervene was consolidated with petitioners' appeal below, but the Court of Appeals, while allowing their participation in briefing and oral argument, did not either grant them status as intervenors or reverse the district court's denial of their motion to intervene. These persons were not accorded the status of parties in this case below, and have failed to follow the procedures for filing a brief *amicus curiae* under Rule 37 of this Court. Accordingly, the Court should strike the brief filed by these putative "respondents-intervenors."

petition presents the same issue as *Santa Fe*, although in the context of the involuntary and coercive atmosphere of high school graduations, *see Lee v. Weisman*, 505 U.S. 577 (1992), as to which the Court declined review in *Santa Fe*, rather than the context of football games. In light of *Santa Fe*, and its direct rejection of the principles upon which the Eleventh Circuit relied in this case, the petition should be granted, and the judgment of the Court of Appeals for the Eleventh Circuit in this case should be reversed.[2]

The respondents mistakenly argue that the history, practices and policy at issue in *Santa Fe* promote or endorse prayer or other religious messages in a materially greater way than the "Graduation Prayers" policy at issue in this petition. Additionally, the respondents argue misleadingly that the judgment below conforms with this Court's decision in *Santa Fe*, although the Eleventh Circuit specifically rejected the Fifth Circuit's judgment in *Santa Fe*, which has now been affirmed by this Court. *See* App. 19a-20a n.7; *Adler v. Duval County Sch. Bd.*, 206 F.3d 1070, 1079 n.7 (11th Cir. 2000) *(Adler IV)*.

In *Santa Fe*, the Court concluded that pre-game invocations may not be regarded as private speech under the circumstances because, even though delivered by students, they "are authorized by a government policy and take place on government property at government-sponsored school-related events." ___ U.S. at ___, 120 S.Ct. at 2275. The Court

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[2] The Court granted the petition for writ of certiorari in *Chandler v. Siegelman*, No. 99-935, vacated the judgment of the Eleventh Circuit and remanded for further consideration in light of the decision in *Santa Fe*. *Chandler* presented numerous and varied issues of the constitutionality of Alabama law governing a wide range of school events in a wide variety of factual contexts, some of which may be controlled, and others not necessarily controlled, by the decision in *Santa Fe*. This case, however, is directly controlled by *Santa Fe* and *Lee*. The only material distinction between *Santa Fe* and this case is the higher level of state control and coercion at graduation exercises than at football games, compelling reversal of the Eleventh Circuit in this case upon application of the analyses of *Santa Fe* and *Lee*.

also rejected the contention in *Santa Fe* that the school district had created a public forum because the policy and practice failed to disclose an intent in state policy or practice that the time for the invocation be open to indiscriminate use by the student body generally. *Id.* at ___, 120 S.Ct. at 2275-76, *quoting, Hazelwood Sch. Dist. v. Kuhlmeier,* 484 U.S. 260, 270 (1988) and *Perry Educ. Assn. v. Perry Local Educators' Assn.,* 460 U.S. 37, 47 (1983). Even when allowing a greater number of speakers to address a broader range of topics, the state does not create a limited public forum because "selective access does not transform government property into a public forum." *Perry,* 460 U.S. at 47.

Moreover, a "student election system," a "majoritarian process implemented by the District guarantees, by definition, that minority candidates will never prevail and that their views will be effectively silenced." *Santa Fe,* ___ U.S. at ___, 120 S.Ct. at 2276. Of controlling significance in this case are the Court's observations in *Santa Fe* and in *Board of Regents of Univ. of Wisc. System v. Southworth,* 529 U.S. ____, 120 S.Ct. 1346, 146 L.Ed.2d 193 (2000), that majority determinations are not constitutionally viewpoint neutral because minority views are not thereby treated with the same respect as those of the majority, and that "[a]ccess to a public forum...does not depend upon majoritarian consent." *Southworth,* 590 U.S. at ___, 120 S.Ct. at 1347, 146 L.Ed.2d at 209; *Santa Fe,* 120 S.Ct. at 2276.

Overall, "fundamental rights may not be submitted to vote, they depend on the outcome of no elections." *West Virginia Bd. of Educ. v. Barnette,* 319 U.S. 624, 638 (1943). As the Court noted in *Santa Fe,* "while...majoritarian election might ensure that most of the students are represented, it does nothing to protect the minority; indeed, it likely serves to intensify their offense." ___ U.S. at ___, 120 S.Ct. at 2277. The petitioners in this case are, most assuredly, members of the relevant minority. The Court in *Santa Fe* rejected the same

contentions as respondents advance in this case, that the policy at issue, involving student speakers and popular election of speakers, separates the school district in any way from the religious content of the speech occurring under the respondents' "Graduation Prayers" policy.

As in *Santa Fe*, the elections occur only because the respondents have chosen to create a policy for student majorities to decide whether student messages of not more than two minutes will be delivered at the beginning and/or end of graduation ceremonies, occasions historically devoted and uniquely suited to delivery of invocations and benedictions. The respondents' policy also delegates to student majorities the selection of the speakers. The resulting messages are then delivered, as in *Santa Fe*, "to a large audience assembled as part of a regularly scheduled, school-sponsored function conducted on school property," and are "broadcast over the school's public address system, which remains subject to the control of school officials" at a ceremony heavily marked by symbols of the schools from which the students are graduating. ___ U.S. at ___, 120 S.Ct. at 2278. "In this context, the members of the listening audience must perceive the...message as a public expression of the views of the majority of the student body delivered with the approval of the school administration." *Id.* at ___, 120 S.Ct. at 2278. This is particularly true for students who, compelled to attend their high school graduations, constitute the state's captive audience turned over to the speaker chosen by election.

Furthermore, as in *Santa Fe*, the text and history of the respondents' policy further demonstrates respondents' intent to promote a predominant continuation of prayer at graduations, extant since time immemorial. *See* ___ U.S. at ___, 120 S.Ct. at 2278-79. The Court of Appeals failed to give meaningful consideration to evidence that respondents' purported secular purpose is a sham. *See id.* at ___ ,120 S.Ct.

at 2278; App. 58a-65a; *Adler IV*, 206 F.3d at 1097-1101 (Kravitch, J., dissenting). The purported purpose advanced, and accepted by the Court of Appeals, to allow students to select an unfettered student speaker to solemnize the ceremony, fails to withstand even deferential scrutiny, just as in *Santa Fe*. Respondents' allowance of a single student to speak for up to two minutes at times uniquely suited and historically employed for invocation and benediction prayers, pursuant to a policy candidly titled "Graduation Prayers," which plainly relies on a Fifth Circuit decision regarding student prayers from the commencement podium, betrays respondents' true purpose. *See* App. 196a. These facts, viewed against the undisputed history of regular delivery of prayers at graduations conducted by respondents, demonstrates a specific purpose of the policy "to preserve a popular 'state-sponsored religious practice.'" *Santa Fe*, ___ U.S. at ___, 120 S.Ct. at 2279, *quoting Lee*, 505 U.S. at 596. *See also, Adler IV*, 206 F.3d at 1098 (Kravitch, J., dissenting) ("The dominant reason for its passage was to keep prayer in graduation ceremonies....") Moreover, if the purpose is to allow truly unfettered speech, ranging to the profane, patently offensive and absurd, no purpose of solemnization can be valid.

Respondents also fail, relying on the majority opinion below, to understand the nature of the coercion analysis enunciated in *Lee* and applied again in *Santa Fe*. The court below misleadingly finds an absence of state coercion simply because respondents do not directly compose the words spoken by the students elected under the "Graduation Prayers" policy. *Adler IV*, 206 F.3d at 1083. However, this Court's coercion inquiry considers, particularly in the context of high school graduations, the essentially compulsory nature of attendance at the event and the pressure to conform from both student peers and school disciplinary authorities. *Santa Fe*, ___ U.S. at ___, 120 S.Ct. at 2280; *Lee*, 505 U.S. at 592-96. In *Santa Fe*, moreover, the Court found impermissible state

coercion of students to participate in religious exercises resulting from the policy even under the assumption that every student's decision to attend football games is purely voluntary. ___ U.S. at ___, 120 S.Ct. at 2280-81. Coercion to participate, or at least acquiesce, in state-sponsored religious messages is even clearer in this case.

Respondents, echoing the Court of Appeals, ask the Court to ignore the history and context of the enactment of the policy, but such a crabbed evaluation has been foreclosed, perhaps even more clearly than before, by *Santa Fe*. "Our inquiry into this question not only can, but must, include an examination of the circumstances surrounding its enactment." ___ U.S. at ___, 120 S.Ct. at 2282. The respondents in this case are in precisely the same position as that observed by this Court of the Santa Fe Independent School District:

> The District, nevertheless, asks us to pretend that we do not recognize what every Santa Fe high school student understands clearly - - that this policy is about prayer. The District further asks us to accept what is obviously untrue: that these messages are necessary to "solemnize" a football game and that this single-student, year-long position is essential to the protection of student speech. We refuse to turn a blind eye to the context in which this policy arose, and that context quells any doubt that this policy was implemented with the purpose of endorsing prayer.
>
> Therefore, the simple enactment of this policy, with the purpose and perception of school endorsement of student prayer, was a constitutional violation.

Id. at ___, 120 S.Ct. at 2282. The same conclusion is inevitable in this case.

Even though prayer is not mandatory at each and every one of respondents' graduation exercises under the "Graduation Prayers" policy, "Government efforts to endorse religion cannot evade constitutional reproach based solely on the remote possibility that those attempts may fail." *Id.* at 1083-84, 120 S.Ct. at 2282-83. The Court of Appeals mistakenly applied to this Establishment Clause case the proposition that a facial challenge fails unless "'no set of circumstances exists under which the Act would be valid.'" App. 28a; *Adler IV*, 206 F.3d at 1083-84, *quoting United States v. Salerno*, 481 U.S. 739, 745 (1987). As this Court reiterated in *Santa Fe*, however, this proposition is inapplicable to laws or policies that fail one or more of the applicable Establishment Clause inquiries. ___ U.S. at ___, 120 S.Ct. at 2281-82.

Respondents' policy also fails a facial challenge

> because it impermissibly imposes upon the student body a majoritarian election on the issue of prayer. Through its election scheme, the District has established a governmental electoral mechanism that turns the school into a forum for religious debate. It further empowers the student body with the authority to subject students of minority views to constitutionally improper messages. The award of that power alone, regardless of the students' ultimate use of it, is not acceptable. Like the referendum in *Board of Regents of Univ. of Wis. System v. Southworth*, 529 U.S. ___, 120 S.Ct. 1346, ___ L.Ed.2d ___ (2000), the election mechanism established by the District undermines the essential protection of minority viewpoints. Such a

> system encourages divisiveness along religious lines and threatens the imposition of coercion upon those students not desiring to participate in a religious exercise. Simply by establishing this school-related procedure, which entrusts the inherently nongovermental subject of religion to a majoritiarian vote, a constitutional violation has occurred. No further inquiry is required for the policy to fail a facial challenge.

Id. at ___, 120 S.Ct. at 2283. Consideration of the history and context of the respondents' "Graduation Prayers" policy compels that the writ be granted and the judgment below reversed.

Finally, while the foregoing demonstrates the facial unconstitutionality of respondents' "Graduation Prayers" policy, the factual record demonstrates that the policy's implementation has violated the Establishment Clause as well. As respondents acknowledge, prayer or other religious speech resulted from the policy at ten of the respondents' seventeen graduation ceremonies in the policy's first year, 1993. Brief in Opposition at 6. The record also reflects specific votes in that year on the precise question of whether to have prayer at graduation, resulting in divided votes. Additionally, for example, the record includes a specific ballot for one high school's class of 1998; the ballot listed candidates for class "chaplain," and then posed the question, "PRAYER AT GRADUATION: 1. Yes 2. No." The next question on that ballot was, "DO YOU WANT THE CLASS CHAPLAIN TO READ THE PRAYER?" Graduates and audience members have been directed to stand during explicitly labeled invocations and benedictions, as well as messages labeled less explicitly but most often delivered by senior class "chaplains."

Even given the truncated discovery in light of the Fed.R.Civ.P. 65(a)(2) consolidation in the district court, the record includes numerous printed programs of graduation ceremonies in 1994, 1995, 1996 and 1997, reflecting an overwhelming domination of explicitly labeled invocations and benedictions, delivered by senior class "chaplains" and other students, as well as less explicitly labeled "farewells," "reflections," or other such messages delivered by the school's senior class "chaplains." *See* Table 1, *infra.*[3] Indeed, the programs containing these explicit labels of the speakers and religious nature of the speech involved are printed by the respondents, who accordingly clearly are aware in advance of the religious content to be expected, despite respondents' protestations that the content is unknown in advance to school board officials. The record, even in its present form, demonstrates actual or apparent state endorsement of these religious messages, which have resulted from "a governmental electoral mechanism that turns the school into a forum for religious debate," *Santa Fe,* ___ U.S. at ___, 120 S.Ct. at 2283, even if prayers or other religious messages do not occur on every single instance of the policy's application. Contrary to the position advanced by the respondents and endorsed by the court below, the record in this case is not limited to the 1993 ceremonies, and indeed is clearly sufficient to demonstrate that the policy's primary effect is to advance or endorse religion. On this basis, as well as the policy's facial unconstitutionality, the petition should be granted.

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[3] These programs were obtained pursuant to Florida public records law prior to the filing of the lawsuit in this case. These programs, properly authenticated, were filed as exhibits in support of petitioners' motion for preliminary injunction in the district court, and this tabulation was furnished to both the district court and the Court of Appeals. The respondents' production of materials in response to the pre-suit public records request did not include materials for all 17 high schools or for all years involved.

CONCLUSION

The petition for a writ of certiorari should be granted and, in light of *Santa Fe,* the judgment below should be reversed.

Respectfully submitted,

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Date: August 22, 2000

TABLE 1

SUMMARY OF CERTAIN EXHIBITS TO MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

School	Year	Description/Speaker
Douglas Anderson	1994	Invocation/Senior Class President
Exhibits 1,2,3		Benediction/Senior Class Chaplain
	1996	Invocation/Senior Class Chaplain
		Benediction/Senior Class Chaplain
	1997	Invocation/Senior Class Chaplain
		Benediction/Senior Class Chaplain
Baldwin	1994	Benediction/Senior Class President
Exhibits 4,5,6,7	1995	Benediction/Senior Class Secretary
	1996	Benediction/Senior Class President
	1997	Benediction/Valedictorian
Englewood	1994	Invocation/?
Exhibits 8,9,10	1996	Invocation/Senior Class Chaplain
	1997	Invocation/Senior Class Chaplain
First Coast	1994	Inspiration/Senior Class Chaplain
Exhibits 11,12,13,14		Farewell/Senior Class Chaplain
	1995	Inspiration/Senior Class Chaplain
		Farewell/Senior Class Chaplain

School	Year	Description/Speaker
First Coast (Con't.)	1996	Inspiration/Senior Class Chaplain
		Farewell/Senior Class Chaplain
	1997	Inspiration/Senior Class Chaplain
		Farewell/Senior Class Chaplain
Fletcher	1994	Senior Reflections/Senior Class Chaplain
Exhibits 16,17,18,19	1995	Senior Reflections/Senior Class Chaplain
	1996	Senior Reflections/Senior Class Chaplain
	1997	Senior Reflections/Senior Class Chaplain
Jackson	1994	Senior Reflections/Senior Class Chaplain
Exhibits 20,21	1995	Senior Reflections/Student
Lee	1994	Invocation/?
Exhibits 22,23,24		Senior Reflections/Senior Class Chaplain
	1995	Senior Reflections/Senior Class Chaplain
	1997	Senior Reflections/Senior Class Chaplain
Parker	1994	Invocation/Senior Class Chaplain
Exhibits 25,26,27,28	1995	Invocation/Senior Class Chaplain
	1996	Invocation/Senior Class Chaplain
	1997	Invocation/Senior Class Chaplain

School	Year	Description/Speaker
Paxon	1994	Occasion/Senior Class Chaplain
Exhibit 29		
Raines	1994	Invocation/Salutatorian
Exhibits 30,31,32,33		Benediction/Clergy
	1995	Invocation/Faculty Department Chair (in Exhibit 31)
	?1995?	Invocation/Salutatorian (in Exhibit 31)
		Benediction/?
	1996	Invocation/Senior Class Chaplain
		Benediction/?
	1997	Invocation/Sean Webb
		Benediction/?
Ribault	1995	Opening Message/Senior Class Chaplain
Exhibits 34,35,36	1996	Opening Message/Senior Class Chaplain
	1997	Opening Message/Senior Class Chaplain
Sandalwood	1994	Invocation/Student
Exhibits 37,38,39,40	1995	Invocation/Senior Class Chaplain
	1996	Invocation/Student
	1997	Invocation/Student

School	Year	Description/Speaker
Stanton	1994	Inspirational Message/Student
Exhibits 41,42	1996	Inspirational Message/Student
White	1995	Invocation/Senior Class Chaplain
Exhibits 43,44,45		Benediction/Senior Class Chaplain
	1996	Invocation/Senior Class Chaplain
		Benediction/Senior Class Chaplain
	1997	Invocation/Senior Class Chaplain
		Benediction/Student Council Chaplain
Wolfson	1996	Benediction/Chaplain
Exhibit 52		
?	?	Opening Message/?
Exhibit 58		